(1)

Supreme Court, U.S.
FILED

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No. [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURTS' NONCOMPLIANCE WITH THE MANDATES OF 28 U.S.C. § 2403(a), AND THE FEDERAL RULE OF APPELLATE PROCEDURE RULE 44, DENIED RODRIGUEZ AND ISIDORO ACCESS TO THE COURTS FOR A MEANINGFUL HEARING ON THEIR CONSTITUTIONAL CHALLENGES TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION DATED OCTOBER 25, 1980, T.I.A.S. No 11,670, 19 I.L.M. 1501 ("TREATY"), AND THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT, 42 U.S.C. SECTION 11601 *ET SEQ.* ("ICARA")?

II. WHETHER THE TREATY AND ICARA ARE UNCONSTITUTIONAL BECAUSE THEY VIOLATED RODRIGUEZ AND ISIDORO'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AS U.S. CITIZENS: (i) IN A FATHER TO PROTECT AND TEACH HIS MINOR SON OF THE BENEFITS AND DUTIES OF BEING A U.S. CITIZEN; (ii) IN THEIR RIGHT TO HAVE ISIDORO REMAIN SAFE IN THE UNITED STATE WITH HIS FATHER; AND, (iii) IN THEIR RIGHT TO MAINTAIN AND PROTECT THE SOCIETY AND COMPANIONSHIP OF THEIR FATHER/SON RELATIONSHIP?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners ISIDORO RODRIGUEZ ("Rodriguez"), and his 13-year-old son, Isidoro Rodriguez-Hazbun ("Isidoro"),[1] requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), which has affirmed the Hon. Judge T.S. Ellis III, ("Judge Ellis"), U. S. Dist. Ct. E.D. VA, holding that the Treaty, and ICARA, have trumped Rodriguez and Isidoro's fundamental Constitutional rights as citizens of the United States to the society and companionship of their father/son relationship; assure Isidoro of the benefits, opportunities, duties and safety of the United States, and not forced to the Republic of Colombia ("Colombia"), and, assure their access to an impartial and meaningful hearing on these Constitutional issues.

OPINIONS BELOW

The unpublished orders of the Fourth Circuit, denying a Petition for Rehearing En Banc on January 7, 2003, is reprinted at A-1 [2], and the unpublished opinion of the panel of December 11, 2002, No. 02-1487, (A-2). The published opinions of Judge Ellis in *Hazbun v. Rodriguez*, 191F.Supp.2d 685 (E.D. Va. 2002), and *Hazbun v. Rodriguez*, 200 F.Supp2d 603 (E.D. Va. 2002), are at A-7 and A-24. The unpublished orders of Judge Ellis of June 10, June 6, and June 5, 2002, are reprinted at A-50, A-52, and A-54.

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[1] Pursuant to Federal Rules of Civil Procedure Rule 17(c) and S.Ct. Rule 12.4, Isidoro has been and is a party in interest because the proceedings below have also adversely affected his fundamental rights as a U.S. citizen.

[2] "A-" references are to pages in the Appendix filed with the Court. "App" refer to pages in the Joint Appendix filed with the Fourth Circuit. "Doc-" refer to the docket entries before Judge Ellis.

JURISDICTION

The judgment of the Fourth Circuit denying a Petition for Rehearing En Banc was entered on January 7, 2003 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1).

Statement Required by S.Ct. Rule 29.4(b)

Pursuant to Rule 29.4(b), the Court is informed that 28 U.S.C. §§ 2403(a) applies. On February 19, and March 20, 2002. Rodriguez gave notice to Judge Ellis of Constitutional challenges to the application of the Convention and ICARA in litigation where the United States is not involved. Also pursuant to FRAP Rule 44. Rodriguez gave notice with to Fourth Circuit on May 9, and August 20, 2002 (A-58 and A-61). The Fourth Circuit certified with the U.S. Department of Justice ("DOJ") on August 20, 2002. However, given the "expedited" briefing schedule and the late certification notice, DOJ was precluded from filing any brief (A-63).

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STATEMENT OF THE CASE

Rodriguez and Isidoro

Rodriguez and Isidoro are U.S. citizens.[3] Due to his law practice, Rodriguez traveled frequently from Virginia to Colombia on a Business Visa from 1988 to 1993, and took up residence in Colombia from 1993 to 1999.[4]

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[3] On March 10, 1989, Isidoro was born in Colombia, and issued a U.S. State Department Certification of Birth Abroad of a Citizen of the United States pursuant to 8 U.S.C. § 1433 (App-157).

[4] In 1988, after serving as Assistant General Counsel for Morrison Knudsen Int'l. in Colombia, Rodriguez was retained by a U.S. investment/exploration group to provide *pro hac vice* fiduciary and legal service against Colombia in what U.S. Congressman Dan Burton described as the "largest private [contracts] claim by American citizens against a foreign state pending in the world . . . ." *Sea Search Armada vs. President of the Republic of Colombia*, Superior 3rd Judicial District of Barranquilla. *See also, Rodriguez v. HFP, Inc.*, 4CCA No. 03-1082 (filed 01/16/2003), suit to enforce Virginia Attorney's Lien on treasure trove, and for violation of Virginia's Business Conspiracy statute.

In August 1988, Rodriguez, married Ms. Amalin Hazbun Escat ('Hazbun"). In 1995, Rodriguez and Hazbun separated and entered into a verbal **divided custody** agreements (App-152, ¶8, App.135 to 136). In violation of the verbal agreement Hazbun filed a suit to seeking **sole custody** of Isidoro with the First Family Court of Barranquilla, Colombia,. The First Family Court of Barranquilla issued an *ex parte* order (App.-3, Doc. No. 8), restricting Rodriguez's access to Isidoro for only eight hours every other Saturday (App. 137). The First Family Court of Barranquilla refused to recognize the verbal **divided custody agreement** and all attempts to lift its *ex parte* order so to force Rodriguez to enter into a written **joint custody** agreement August 1, 1997, or in the alternative be faced with litigating the issue over many years, while the *ex parte* restriction stayed in place (App. 153 ¶13). Subsequently the First Family Court issued another *ex parte* order changing the **joint custody** to **sole custody** given to Hazbun (App. 158).

While the above custody litigation was occurring in April 1997, Hazbun sought to forcibly remove Rodriguez from Colombia by making false allegations with Colombian law enforcement. Furthermore, after his divorce in November 1997, Rodriguez had to fight off various physical attacks, and was the subject of various threats of kidnapping.

After returning to reside in Virginia in 1999, in February 2000, a threat of kidnapping was posted at the ranch of Rodriguez where both he and Isidoro stayed when together (App.-98 to App.-108, Defendant's Exhibit 4). The threat was sufficiently credible against Isidoro in Colombia that Rodriguez flew down from Virginia to Barranquilla, to participate in an operation with the Colombian Army anti-kidnapping unit to specifically protect Isidoro.

On April 17, 2001, the United States Department of State ("State Department"), issued a Warning to United States citizens against travel in and to Colombia, since,

> "[v]iolence . . .affects all parts of the country, both urban and rural. . . . **U.S. citizens of all age groups** and occupations, both tourist and residents, have been victimized. Bombing have occurred throughout Colombia. . . ." (Emphasis added).

Due to this increased violence in Colombia against U.S. citizens, and the direct threat Rodriguez has not been able to return to his ranch and/or office in Colombia since 2000. Thus based on Isidoro's desire to be with his father and his rights to live in the United States as a U.S. citizen, while residing in Virginia with his father, Isidoro filed *Master Isidoro Rodriguez-Hazbun, Petitioner,- v. Ms. Amalin Hazbun Escaf*, Case No. JJ-347-050-01-01, Juvenile and Domestic Relations Court of the County of Fairfax ("Fairfax Custody Court")(A-65)[5], seeking modification of the Joint Custody Agreement due to the increasing dangers and "zone of war" throughout Colombia, the repeated breach of the divided custody agreement by Hazbun, the cutting off all communications with by Hazbun as to the welfare and well being of Isidoro, the refusal by Hazbun to discuss with either Isidoro or Rodriguez, Isidoro's opinion and desire to remain in the United States, and Hazbun taking "home court advantage" in the Family Courts in Barranquilla so to deny Isidoro his right to express his wishes to live with his father.

On October 8, 2001, the State Department received Hazbun's request under the Treaty. In mid-October 2001 and January 3, 2002, pursuant to 51 Fed. Reg. 58. 10509, the State Department sent to the Fairfax Family Court the notice that a claim under the Treaty had been filed. Rodriguez responded that based on

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[5] The Fairfax Family Court proceeding has been stayed pending resolution of this action. Irrespective of the type of custody, under Colombia law both parents retain the right and responsibility for the care, control, protection and authority to make decisions concerning Isidoro. Unlike in the United States, Colombian domestic relations law the issues of support, custody and divorce are considered separately by different Family Courts, and there is no right of review or appeal.

Isidoro's fundamental rights as a U.S. citizen, the Treaty and ICARA do not apply.

On February 22, 2002, the State Department Advisory that the "security situation in Colombia [had] worsened in the aftermath of the collapse of peace talks between the government and rebels." (App.-147) On March 27, 2002, the State Department listing three (3) terrorist organization in Colombia, and in its Country Report on Colombia and in various warning to all U.S. citizens of all ages advised against being in Colombia due to the fact that "**there is a greater risk of being kidnapped in Colombia than in any other country in the world.**" (Emphasis added) (# 20, #27, and #33, App.146 and 148).

Proceedings Before Judge Ellis

In response to Isidoro's Complaint to modify the Custody Agreement, the instant federal Complaint was filed under the Treaty and ICARA on December 20, 2001.

A Motion to Abstain, and/or Dismiss pursuant to FRCP Rule 19, and a Motion for Sanctions under FRCP Rule 11, were filed on February 19, 2002, which challenged the Constitutionality of the Treaty and ICARA, stating that,

> the forcible return of [Isidoro under the Treaty and ICARA] would not be permitted under the fundamental rights granted to [Rodriguez] as a citizen of the United States. . . .. [and] . . . [Isidoro] who has . . . maturity to determine that his best opportunity for the future is to be gained from his studies, experience and opportunities as a U.S. citizen in the United States. (Doc. 5)

In seeking FRCP Rule 11 Sanctions, it was stated that,

> . . . [Isidoro] is by birth a United States citizen, and a citizen of the State of Virginia, and has fundamental rights to due

process and to be safe from the danger to U.S. citizens in the Republic of Colombia, pursuant to the U.S. Constitution. *See generally Reid v. Covert* 354 U.S. 1, 77 S.Ct. 2222 (1957), . . . and, that the forcible return of [Isidoro] to Colombia would not be permitted because of the fundamental principles of the United States of due process and equal protection of the laws granted to him as a United States citizen. . . . (Doc. 3)

After argument on March 18, 2002, Judge Ellis, denied these motions, *Hazbun v. Rodriguez*, 191F.Supp.2d 685 (E.D. Va. 2002)(A-7), stating that: (i) ". . . in passing, let me say that the child is not an indispensable party in the Court's view under Rule 19. Indeed, it's not a necessary party under the rules."[6] (App.-24, line 14); (ii) it had authority to order Rodriguez to send Isidoro to Colombia irrespective of his wishes as a U.S. citizen (App.-41, Line 6); and (iii) that neither the *Younger Abstention*, nor the *Colorado Abstention Doctrine* applied because it was Judge Ellis position the State Department notice under the Treaty to the Fairfax Family Court was *ex parte*, and thus the Treaty issue is not before the Fairfax Family Court (A-22). Despite the clear and repeated Constitutional challenge to Treaty and ICARA, Judge Ellis did not comply with the mandate of 28 U.S.C. § 2403(a), or even considered the challenge by not issuing any finding of fact or conclusions of law as required under FRCP Rule 52 (A-7 and A-24).

On March 20, 2002, Rodriguez filed an Answer and Affirmative Defense, again raising his Constitutional challenge to the Treaty and ICARA, by stating that,

pursuant to rights and limitations in the United States Constitution, and Art. 20 of the Convention, neither the United States Congress nor this Court has authority to order

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[6] Disregarding FRCP Rule 17(c). Judge Ellis stated he would deny any future motion for Isidoro to intervene.

Defendant as a United States citizen, to violate the fundamental right of father and son, so to direct that Defendant to send his son from the United States to the "zone of war" of the Republic of Colombia. (Doc. 18)

An expedited bench trial was ordered for March 25, 2002, providing for only 30 days of discovery. On April 12, 2002, and April 19, 2002, Judge Ellis further limited Rodriguez's rights to discovery by restricting the deposition of Hazbun to only issues presented under the Treaty (App.-8, Doc.46). Also, Judge Ellis without notice permitted another "volunteer" attorney with the National Center for Missing and Exploited Children to appear on behalf of Hazbun.

At the commencement of the bench trial held on April 25, 2002, Judge Ellis expressed clearly his subjective views regarding his preference for Hazbun and the use of the Treaty and ICARA, in this exchange with Rodriguez (App.-47, line 4),

> ATTORNEY RODRIGUEZ: Your Honor, I note to the Court, I requested [of] my Son [his opinion], and he adamant about the fact that he wishes to stay in the United States and wishes to proceed with the action that's in the Virginia State court, [once] we have to go beyond this action under the Treaty
> THE COURT: All right.
> ATTORNEY RODRIGUEZ: So, pursuant to that, I am compelled to, as his father, accede to his wishes.
> THE COURT: No, you are not compelled to accede to any wishes. I have been the father to two 13-year-old, and I never acceded to any of their wishes, because I knew what was best for them. That was my function as a parent.

Being limited to the procedures under the Treaty and ICARA, in establish the exception under Art. 13(b) of the Treaty (A-74), a timely motion for Judicial Notice of the worsening "zone of war" situation throughout Colombia was timely filed on April 24.

2002 (Doc. 51). At trial, Rodriguez called Mr. Tim Moore who testified as to the danger of kidnapping generally, and danger in Barranquilla (App.-61 to App.-69), Mr. Blair Sibley who too confirmed the physical danger for U.S. citizens (App.-74 to App.-90), and Mrs. Irene Rodriguez who confirmed the specific threat of kidnapping, and the increased "zone of was" throughout Colombia (App.-78 to App.-100). Finally, on cress Hazbun also confirmed the increasing "zone of war" in all Colombia, including Barranquilla (A135 to App.-136).

Regarding the exception under Art. 13¶3 of the Treaty (A-74), Rodriguez called Isidoro's math teacher at Mark Twain Middle School, Derek Steele, regarding Isidoro's maturity, who responded to Judge Ellis question as follows,

> A. My impression of him as a young man, he does the things that need to do. He is a very sharp young man in what he does . . . .**I think with his maturity level, he is one of those kids that, maturity-wise, he seems to have an understanding of life more than other kids.** (Emphasis Added) (App.-69 to App.-78).

Regarding Isidoro's own testimony as to his objecting to returning to Colombia and his desire to stay in the United States with his father, the following responses were made to the Judge Ellis,

> THE COURT: All right. And I read the letter that you wrote to your mother. Is it -- what is your desire about staying here or returning home?
> THE WITNESS: Right now, I want to live here with my dad for some time, and then maybe when things go better in Colombia, I can go to my mom's, one year there, one year here.
> THE COURT: Are you concerned about things in Colombia?

THE WITNESS: Colombia is in bad experience. Barranquilla is not doing well right now. Things have gone tense, because there was an attempt of assassination of the president, candidate. (App.-109 line 15)

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THE WITNESS: Because I want to live with my dad, and because I want to learn, you know, what my dad does, and I want to be in touch with him. Because six years, I stay with him one month each year. And plus, I want to be in a better opportunity for job careers than in Colombia. They are in depression. So it is like recession right now in Colombia.

THE COURT: You realize that you can do all of that once you get to be older and get into high school and college?

THE WITNESS: Yes.

THE COURT: But what I hear you saying is you want to be with your father now?

THE WITNESS: Yes.(App.-110, line 20)

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THE WITNESS: I spend six years in Colombia, then I spent six years in Colombia, but without my dad, and now I spend six years with my dad, like half and half, until I am eighteen.(App.-112, line 16)

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THE COURT: And tell me again, just in your own words, why you would like to remain in the United States.

THE WITNESS: Because -- first, because the danger in Colombia; and second, because there is more opportunities here for me to live here. And I think that it's time for me to live with my dad for some time. And I think that's one of the main reasons -- not one of; the main reason.

THE COURT: From listening to you, I sense that of those reasons, the most important is that you just want to be with your dad at this point in your life.(at App.-117, line 19)

In response to this testimony, Judge Ellis discussed both on and off the record his subjective opinion and experience of being

from divorced parents and growing up with his mother, as well as divorced and his leaving his sons with their mother to raise(App. 43, App140 to 141). Judge Ellis made clear that he was concerned neither about the increasing "zone of war" in all Colombia, nor of the fundamental rights of the father/son relationship, nor that Isidoro would be forced out of the United States and deprived of his rights as a U.S. citizen until he was 18 years of age (App.-115).

On May 6, 2002, Judge Ellis issued his decision *Hazbun v. Rodriguez*, 200 F.Supp2d 603 (E.D. Va. 2002)(A-24), ordering Isidoro immediate return to Colombia based on the Treaty, and refusing to take judicial notice of the rapidly worsening situation occurring in Colombia since January 2002, and based only on the testimony of Hazbun finding that Colombia was only dangerous for adult U.S. citizens. Again despite the clear and repeated Constitutional challenge to Treaty and ICARA, Judge Ellis did not comply with the mandate of 28 U.S.C. § 2403(a), or even consider the challenge by not issuing any finding of fact or conclusions of law as required under FRCP Rule 52 (A-46).

Only after Rodriguez argued and briefed his right to the automatic 10 day stay under FRCP Rule 62 (Doc. 54), did Judge Ellis grant a stay for the limited purpose of filing an expedited appeal and seeking a stay. Rodriguez filed a Notice of appeal with the Fourth Circuit on May 7, 2002, and a motion for a stay (4CCA No. 02-1487).

On May 22, 2002, the panel denied the motion to stay, but did grant an expedited appeal. On May 23, an Emergency Application for a Stay was addressed to the Honorable Rehnquist (S.Ct. No. 01A930), who denied the application on May 29, 2002. On May 31, 2002, a renewed application for a stay was submitted to the Justice O'Conner, who referred the request to the full Court, but was denied on June 10, 2002 (A-50, A-52, and A-54).

On June 11, 2002, Isidoro was forced to Colombia against his will and fundamental rights as a U.S. citizen based on the order of Judge Ellis.

The transcript was ordered on May 13, 2002, but inconsistent with The Court Reporter Guide to Judiciary Policies and Procedures, Chapter 20, Part 12, and Part 12.1.d, and The Guidelines for Preparation of Appellate Transcripts in the Fourth Circuit. Judge Ellis' Court Reporter failed to file a transcript until August 13, 2002, thereby denying its use during the above efforts to obtain a stay, and delaying the consideration of the "expedited" appeal.

Proceedings before the Fourth Circuit

Rodriguez raised his Constitutional challenge to the Treaty and ICARA pursuant to 28 U.S.C. § 2403 and FRAP Rule 44, in the notices filed May 9, and August 20, 2003 (A-58 and A-61), with the Fourth Circuit Clerk's office. However, the Fourth Circuit failed to timely certify the issue with the U.S. Department of Justice of the Constitutional challenge until August [illegible], 2002, precluding the Department of Justice from filing any b[illegible]f (A-65).

Rodriguez in his Brief and Reply Brief challenged the Constitutionality of the Treaty and ICARA used to shanghai Isidoro from the United States. However, during Rodriguez's oral argument on October 29, 2002, a judge on the panel voiced his surprise since he was lead to believe that this was just a Treaty case. On December 11, 2002, the Fourth Circuit Panel issued its order which begun with, "[t]his case is brought under the Treaty. . . ." (A-1). Thus to date the lower courts have assumed away and not addressed the Constitutional challenge.

Rodriguez and Isidoro's FTCA, *Bivens*, 42 U.S.C. §§1986 Action

Rodriguez and Isidoro filed an administrative claim pursuant to the Federal Tort Claims Act was filed on January 7, 2002, with an amendment on September 15, 2002.

On January 27, 2003, Rodriguez and Isidoro filed a suit in the United States District Court for the District of Columbia, *Isidoro Rodriguez, and minor son, Isidoro Rodriguez-Hazbun v. National Center for Missing and Exploited Children et al.*, D.C. Dist. Ct. No. 03-0120, Robert, J., for the alleged conspiracy to obfuscate and violate their fundamental rights under Amendments I, V and IX of the Constitution in their father/son relationship, access to the courts of the Commonwealth of Virginia and/or the federal courts to consider their Constitutional challenges to the Treaty, and equal protection and due process under Article 13b and 13¶ 3, and Article 20 of the Convention, so to expedite on June 11, 2002, the shanghaiing of Isidoro to Colombia, as well as for violation of 42 U.S.C. 1985 & 1986, based on denial of rights due to discrimination against their being Hispanic.

REASONS FOR GRANTING THE WRIT

This Court's review of the Fourth Circuit's decisions is warranted because the lower courts, (i) have entered a decision in conflict with the decisions of this court and other United States court of appeals on the protection of the fundamental Constitutional rights in the society and companion within the father/son relationship; (ii) has far departed from the accepted and usual course of judicial proceedings under 28 U.S.C. § 2403(a), thereby calling for an exercise of this Court's supervisory power; and (iii) has decided an important question that conflicts with decisions of this Court as to access to the courts and the rights' of U.S. citizens vis-a-via a treaty

I. NONCOMPLIANCE WITH THE MANDATE OF 28 U.S.C. § 2403(a), VIOLATED RODRIGUEZ AND ISIDORO'S RIGHTS TO ACCESS TO THE COURTS FOR A MEANINGFUL CONSIDERATION OF THEIR CONSTITUTIONAL CHALLENGES

To assure that always there is a full and meaningful consideration of any Constitutional challenges to their acts,

Congress through 28 U.S.C. § 2403(a) (2003)(A-72), has mandated that in any action in a court of the United States to which the United States is not a party, wherein the constitutionality of any Act of Congress is drawn into question, "the court **shall** certify such fact to the Attorney General, and **shall** permit the United States to intervene," so to present argument on the question of constitutionality. *See*. Note, *Federal Intervention in Private Actions Involving the Public Interest*. 65 Harv. L. R. 319.

As discussed above, under 28 U.S.C. § 2403(a) and FRCP Rule 44, Rodriguez in a timely fashion raised early and repeatedly his Constitutional challenges to the Treaty and ICARA (A-58 and A-61), *Max M. v New Trier High School Dist.* 859 F2d 1297 (7th Cir. 1988).

Once Rodriguez raised his Constitutional challenges it was the duty of Judge Ellis and the Fourth Circuit to comply with the mandate of 28 U.S.C. § 2403(a), by issuing a certification notice to the Attorney General so to leave to him the decision whether to intervene, thereby assuring a meaningful consideration and due process to Rodriguez and Isidoro. This mandate neither Court could ignore even if they viewed the challenges as frivolous or they intended to disposed of them on other grounds. *International Ladies' Garment Workers' Union v Donnelly Garment Co.* 304 U.S. 243, 58 S. Ct. 875 (1938); *Merrill v Addison* 763 F2d 80 (2nd Cir.1985); *Wallach v Lieberman*, 366 F2d 254 (2nd Cir. 1966).

However, the lower courts did not comply with this mandate, so to permit them to hold that ICARA and the Treaty controlled the litigation, and thereby assume away this Court and other Circuit Court's precedent as to Rodriguez and Isidoro's fundamental constitutional rights as U.S. citizen. Specifically, the lower courts circumvented the right to a full and fair meaningful hearing on the Constitutional challenges to the Treaty and ICARA by at no time requiring opposing counsel to address the Constitutional challenge, and by intentionally issuing a late certification notice depriving the United States to be heard on the issue (A-61).

Keyes v Madsen 179 F2d. 40 (1949, App. DC), *cert. den.* 339 U.S. 928, 70 S. Ct. 628 (1950).

Furthermore, since the Treaty and ICARA do not include a choice of law provision, the laws of Virginia control, *see Meddox v. American Airlines*, 298 F.3d 694, 699 (8th Cir. 2002); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996). Also, under 42 U.S.C. § 11604(b)(A-76), Virginia law had to be complied with before Isidoro could be taken from Rodriguez. Thus Isidoro's preference as a 13-year-old boy to stay with his father had to be respected under VA Code §20-124(1) and (8)(A-78),[7] *Zambolin v. Hicks*, No. 1647-99-2 (VA Ct. of App., Dec. 28, 1999); *Bourne v. Frey*, No. 2565-93-4 (VA Ct. of App., Dec. 20, 1994). The Court under VA Code § 20-124.3(7), was required to consider Hazbun's refusal to participate in mediation or talk with Rodriguez, and insisted on only communicating by fax, as demonstrating a propensity to actively not support Isidoro's relationship with the Father and as an inability to cooperate, *Etter v. Etter*, No. 0506-97-4 (VA Ct. of App. May 5, 1998)(A-58, and A-153 ¶12).[8] However, by refusing to either abstain or interplead Isidoro, or follow Virginia law, Judge Ellis denied Rodriguez and Isidoro access to the court for a meaningful hearing of their Constitutional challenges.

"[T]he right to . . . defend in the courts," this Court stated long ago, "is the alternative of force. In an organized society it is the

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[7] As already noted Isidoro emphatically stated that, "I want to live with my dad, and because I want to learn, you know, what my dad does, and I want to be in touch with him. Because [for] six years, I [can only] stay with him one month a year. . . .(App-110, line 20).

[8] State Department regulations provide that, "[p]arties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. . . . In the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgement. 51 Fed. Reg 58 (1986)

right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). The right not only protects the ability to get into court, *see*, e.g., *Ex parte Hull*, 312 U.S. 546 (1941), but also ensures that such access is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Furthermore, this Court has stated that "[t]he fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), the District Court was in error.

More recently, this Court stated that, "[w]hether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Warren Christopher, Former Secretary of State, et al. v. Jennifer K. Harbury*, 122 S. Ct. 2179 at 2185;153 L. Ed. 2d 413 (June 20, 2002). In short, one key standard is that any claim of being denied access to the courts for a meaningful hearing must show what underlying legal action, rights and remedies were frustrated by the denial. *Id.* 122 S.Ct at 2187.

In the proceeding below the rights and remedies of Rodriguez and Isidoro derived from their father/son relationship were repeatedly frustrated by the direct and purposeful effort to interfere with said fundamental constitutional rights, thereby by denying access to and meaningful consideration of the Constitutional challenge. Consequently, ICARA and the Treaty are unconstitutional as applied. Furthermore, because both lower court intentionally failed to comply with the mandate of 28 U.S.C. § 2403(a), the Court must order the United States to appear as a party to this proceeding and rule specifically on Rodriguez and Isidoro's constitutional challenges, *Pleasant-El v Oil Recovery Co.* (11th Cir. 1998) 148 F3d 1300; *Thatcher v Tennessee Gas Transmission Co.* (5th

Cir. 1950) 180 F2d 644, cert den. 340 U.S. 82, 971 S. Ct. 66 (1950).

II IN DISREGARDING THE FUNDAMENTAL RIGHTS OF RODRIGUEZ AND ISIDORO THE TREATY AND ICARA ARE UNCONSTITUTIONAL

In the proceedings below Rodriguez and Isidoro claimed their fundamental rights under the V and IX Amendments to the Constitution as U.S. citizens (A-72), including: (i) in the society and companionship of their father/son relationship, *Prince v. Massachusetts*, 321 U.S. 158 (1944),[9] *Troxel v. Granville*, 530 U.S. 57 (2000);[10] *Reno v Flores*, 507 U.S. 292, 301-302 (1993); *Franz v. United States*, 227 U.S. App. D.C. 385, 707 F.2d 582 (D.C. Cir. 1983);[11] (ii) to assure Isidoro of the benefits, opportunities, and duties of his U.S. citizenship, *Reid v. Covert*, 354 U.S. 1 (1957), *Yaser Esam Hamdi et al. v. Rumsfeld, et al.*, 4CCA 02-7338 (January 8, 2003); (iii) to assure that Isidoro be secure and not forcibly shanghaied from the United States to the "zone of was"

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In *Prince*, this Court stated that there is a constitutional dimension to the right of parents to direct the upbringing of their children, "[i]t is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166

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In *Troxel*, this Court held that due process clause of the Fifth Amendment guarantees more than fair process, that it has a substantive component that, provides heightened protection against government interference with the fundamental rights and liberty interests, and this includes the interest of a parent in the, "care, custody, and control of their children–[as] perhaps the oldest of the fundamental liberty interest recognized." *Id.* at 63

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In *Franz*, the D.C. Court of Appeals recognized the fundamentally constitutionally protected liberty interest of a father in the society and companionship of and the right to raise his minor child to assure the development of "parental and filial bonds free from government interference." *Id.* at 595.

throughout Colombia, where as a U.S. citizen he is increasingly exposed to the likelihood of being kidnaped and/or killed, *Friedrich v Friedrich*, 983 F.2d 1396 (6th Cir. 1993), and *Id*, 78 F.2d 1060 (6th Cir. 1996); *see also*, *Nwaokolo v. INS*, 314 F.3d 303 (December 27, 2002);[12] and (iv) to access to the courts of the Commonwealth of Virginia and the federal courts to obtain a meaningful hearing so to protect said fundamental rights and his minor son, *Terry E. Butera v. District of Colombia et al.*, 235 F.3d 637 (2001); *Christopher v. Harbury*, 536 U.S. 403, Sct. 01-394 (2002).

Despite the above precedent the lower courts assumed away these fundamental rights based on the Treaty and ICARA. (A-6 and A-46).

A. The Treaty and ICARA do not trump the fundamental Constitutional rights of a U.S. citizen under the V and IX Amend.

Regarding a U.S. citizen's fundamental rights vis-a-vis the operation of a treaty, in *Doe v. Braden*, 57 U.S. (16 How.) 635, 656 (1853), this Court held that U.S. courts have a legal "right to annul or disregard" the provisions of a treaty if "they violate the Constitution of the United States." Also this Court has declared that "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1871). In *Geoffrey v. Riggs*, 133 U.S. 258, 267 (1890), this Court found that the federal government's treaty power does not enable it "to authorize what the Constitution forbids." Later cases, such as *U.S. v. Wong Kim Ark*, 169 U.S. 649, 700 (1898), and *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), this court

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[12]In *Nwaokolo*, the Seventh Circuit denied the deportation of a mother based on the fundamental rights of her U.S. citizen child to be safe from the high probability of harm. *Id.* at 314

reiterated the point that constitutionally protected rights are sheltered from the domestic effect of treaties.[13]

In *Reid v. Covert*, 354 U.S. 1, 77 S.Ct 1222 at 1225(1957), this Court specifically held that the provisions of the Constitution which are designed to protect the fundamental rights of a U.S. citizen from government infringement (chiefly the Bill of Rights), apply to the power of the federal government in foreign no less than in domestic affairs. Furthermore, the prohibitions of the Constitution were designed to apply to all branches of the National Government, **including the judicial branch**, and cannot be nullified, *Id* at 1230. This Court reaffirmed that it "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," and that,

> there is nothing in [the Constitution's] language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggest such a result . . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the bill of Rights–let alone to our entire constitutional history and tradition–to construe Article VI [re treaties] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [re the amendment process].

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On this issue Thomas Jefferson, wrote that, "[o]ur particular security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is up to them we have no Constitution." Letter to Wilson Cary Nicholas, September 1803, *Jefferson Writings* (New York: Library of America, 1984), p. 1139.

Thus the Constitution does not authorize Congress to enlarge or abridge the fundamental rights of citizens, *Schneider v. Rusk, Secretary of State*, 377 U.S. 163; 84 S. Ct. 1187 (1964). Consistent with this holding, the Ninth Circuit recently held that even a naturalized citizen cannot be denied of their rights as citizens,[14] stating that,

> Citizenship in the United States of America is among our most valuable rights. For many of us, it is all that protects our life, liberty, and property from arbitrary deprivation. The world is full of miserable governments that protect none of these rights. Many of us would be dead or never conceived in wretched places in other countries, had we or our ancestors not obtained American citizenship. The opportunities that we want to pass on to our children depend on their secure rights to stay in this country and enjoy its guarantees of life, liberty, and property, and the domestic peace and prosperity that flow from those guarantees. *Gorbach, et al. v. Reno*, et al., 219 F.3d 1087 at 2005 (9th Cir. 2000).

Consequently, the Treaty and ICARA are unconstitutional because this Court stated that the "[r]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them." *Boos v. Barry*, 485 U.S. 312, 324 (1988).

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[14]Thus with the exception of when there are acts which would justify expatriation under 8 U.S.C 1481, or acts of treason. *Yaser Esam Hamdi Esam Rouad Hamdi v. Donald Rumsfeld et al.*, 316 F.3d 450(4th Cir. 2003), because as recently stated by the Fourth Circuit, "[t]o deprive an American citizen of [the] protections [of the Constitution] is not a step any court would casually take." *Id.* at 4722.

B. Neither Congress nor the Court have authority to "deport" a U.S. citizen guilty of no crime.

Under Art IV, sec. 2, cl. 2, the Constitution only provided Congress with authority to deliver up a fugitive from justice, 1 Stat. 302 (1793), 18 U.S.C. §3182; *Melia v. United States*, 667 F.2d. 300 (2d Cir. 1998), thus the Constitution did not grant Congress or the Courts any authority to take out of the United States Isidoro against his objections or his fundamental rights.

Thus Treaty and ICARA as applied are unconstitutional because the District Court was without authority to have ordered Rodriguez to hand over of Isidoro to the Court under the threat of contempt (A-54), so to permit the shanghaiing of Isidoro to Colombia.

C. Judge Ellis Denied Rodriguez and Isidoro Their Constitutional Rights in not Abstaining under *Younger* Doctrine, or Not Interpleading Isidoro under FRCP Rule 19(a)(2).

Isidoro filed a suit in the Fairfax Family Court on July 13, 2001(A-65). Pursuant to 51 Fed. Reg. 10,509 (1986), the State Department issued a Hague Notice letter to the Fairfax Family Court on October, 2002, and again on January 3, 2002. Subsequently, this action was filed, and disregarding both the original proceeding before the Fairfax Family Court and the State Department's notice, Judge Ellis denied a motion to abstain, or in the alternative dismiss for failure to name Isidoro as an indispensable party, or to permit Isidoro to intervene (A-7).

i. *Younger* Analysis

Under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 27 L.Ed. 2d 669 (1971), abstention is appropriate when three conditions are met: (i) where there is an ongoing state judicial proceeding; (ii) where the proceeding implicates important state interest; and (iii) where there is an adequate opportunity to present the federal claims

in the state proceeding. *Employers Res. Mgmt Co. v. Am Employer Benefit Trust*, 65 F.3d 1126 at 1134 (4th Cir. 1995).

All three elements were present in this action: first, there was an earlier filed Virginia Family court proceeding in which there was issued State Department notice of the Treaty; second, because the procedures under ICARA and the Treaty are not structured to protect the fundamental Constitutional rights of Isidoro and Rodriguez, Virginia proceeding implicated an important state interest under Va. Code 20-124.4 (A-78); and third, Hazbun who appeared in the Virginia proceeding has an opportunity to argue the Treaty claim.

Recently, the Fourth Circuit stated in *Nivens v. Gilchrist*, 4CCA No. 02-1176 (decided February 11, 2002), that, "a federal court must abstain from interfering with an on going state proceeding where the litigant has 'an opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary. *Middlesex [County Ethics v. Garden State Bar Ass'n]*, 457 U.S. 423 at 437 (1982) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973))." Thus Judge Ellis based on the application of the Treaty and ICARA denied constitutional rights by not abstaining.

ii. Dismissal or permitting Isidoro to interplead under FRCP 19

FRCP Rule 12(b)(7) authorizes a motion to dismiss a complaint for failure to join a "needed" party under FRCP 19(a). *Ricci v. State Bd of Engineers*, 569 F.2d 782 (3rd Cir. 1978), whose interest in the dispute is such that to proceed in his absence might prejudice him. *McDonald v. General Mills, Inc.*, 387 F.Supp. 24, 37 (Ed Ca., 1974). FRCP 19(a)(2), requires joinder of Isidoro as one who claims an interest relating to the subject of the action and who is so situated that the disposition of the action in his absence may impair his ability to protect his interest as a U.S. citizen to stay in the United States.

Isidoro is an indispensable party since it is also his rights as a U.S. citizen which are adversely affected by the seeking to shanghai him to Colombia until he is 18 years of age. *Aquilar v. Los Angeles*, 751 F.2d 1089 (9th Cir. 1985), *cert. denied* 105 S.Ct. 2656, 86 LE2d 273. Regarding the ability of Rodriguez to protect Isidoro's interest, the determination must be made "as a practical matter." *Provident Tradesmens Bank & Trust Co. v. Patterson.*, 390 U.S. 102, 110; 88 S.Ct 733 (1968), and since consideration was limited to the Treaty and ICARA, the practical results of the judgment prejudice Isidoro's interests, thus the requirement of FRCP Rule 19(a)(2)(i) is satisfied, *Shutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970); *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185 (3rd Cir. 1979).

However, both on and off the record Judge Ellis stated that irrespective of the fact Isidoro would not be permitted to return to the United States until he became 18-years-old, the Court could and would force Isidoro out of the United States by issuing a contempt order against his father (A-7, and A-50, A-52, and A-54). Thus despite Isidoro and his Father's objections, Judge Ellis knowingly deprived Isidoro of his fundamental rights to liberty without due process, *Kent v. Dullus*, 357 U.S. 116 (1957), and benefits and protections of his citizenship under V and IX Amendments to the U.S. Constitutions until 2008, by trumping said rights by only considering issues raised under ICARA and the Treaty. Judge Ellis's denial of due process and equal protection of the laws based on the Treaty and ICARA, so to "deport" Isidoro is even more disturbing given that the Supreme Court in *Bridges v. Dixon*, 326 U.S. 135, 154 (1946), has granted even Aliens facing removal from the United States due process (*see also, Cholmos v. United States Dept. of Justice, INS*, 220 516 F.2.d 310, 313 (3d. Cir. 1999)), stating that,

> [t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives, him of the right to stay and live and work in this land of freedom. **That deportation is a penalty–at times a most serious one–cannot be doubted.** Meticulous care must be

exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

D. The Lower Courts Denied Rodriguez and Isidoro of Due Process by Refusing to Follow State Department Warnings and Other Circuit Precedent Granting Judicial Notice of the Escalating "Zone of War" in All of Colombia.

i "Zone of War" Exception

Regarding the exception to the Art. 13(b) of the Treaty (A-74), under 42 U.S.C. § 11603(e)(2)(A) (A-76), all other circuits, including Fourth Circuit in *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001), have followed the Sixth Circuit holding in *Friedrich v. Friedrich*, 78 F.2d 1060 at 1069 (6thCir. 1996), which states that,

> [A] grave risk of harm for purposes of the Convention can exist only [when]. . . there is a grave risk of harm when the return of the child puts the child in immediate danger *prior* to the resolution of the custody dispute–e.g. **returning the child to a zone of war**.... (Emphasis added)

As one recent commentator noted, "[t]his exception [under Art. 13(b)] would include situations such as returning a child to a nation gripped in war. . . ." Nelson, *Turning our backs on the Children: Implications of Recent Decisions Regarding The Treaty on International Child Abduction."* 2001 Univ. Ill. 669 (2001) at p.676.

The State Department has stated that Colombia is "one of the most dangerous places in the World." State Department Pub. #10407, and has warned U.S. citizens of all ages from traveling there. As the Fourth Circuit recently held, the Executive Branch conclusions are to be followed since it is "in the best position to appraise the status of a conflict,"*Yaser Esam Hamdi et al. v. Rumsfeld, et al.*, at 52, 4CCA 02-7338 (January 8, 2003), citing *United State v. The Three Friends*, 166 U.S. 1, 63 (1897)("[I]t

belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."). *See also*, *INS v. Fredy Orlando Ventura*, 123 S.Ct. 353 (November 4, 2002).

Although it is true that because the Treaty and ICARA do not specifically define "grave risk," the courts have experienced a free-for-all as they try to find what fits under the exception (*Bondin v. Dubois*, 78 F.Supp2d 283, 297 (S.D.N.Y. 2000) (*Blondin III*); *Walsh v. Walsh*, 221 F.3rd 204, 218-219 (1st Cir. 2000) (*Walsh II*), there is no legal or factual precedent to support Judge Ellis's holding (A-45), and the Fourth Circuit affirming (A-2), that although Colombia is in the midst of a internationally recognized civil war, and that all adult U.S. citizens are in constant danger of either kidnapping or death, that there be a specific showing that Isidoro as a U.S. citizen child would be in grave risk in Colombia and Isidoro should be returned there to maintain the *status quo*. However, very relevant to the issue of maintaining the *status quo* envisioned in a static world under the Treaty is a response to the key question-- how is Rodriguez to go to Colombia to litigate the custody issue pursuant to Isidoro's wishes, if it is too dangerous generally for U.S. citizens, and for him specifically under a threat of kidnapping by FARC?

This not only defies the State Department's expressed warnings to "U.S. citizens of all ages", and this court's precedent on the judicial branch recognition of the Executive Branch finding on conditions in a foreign county, but too the clear testimony of Tim Moore, Blair Sibley, Irene Rodriguez, and even Hazbun.

ii. <u>The Denial of due process by the refusal to take judicial notice.</u>

Pursuant to FRCP Rule 52(b)(A-74), Rodriguez challenged the sufficiency of evidence supporting Judge Ellis finding of fact that Colombia was safe for Isidoro as a U.S. citizen minor.

Given the effective denial of meaningful discover by the expedited procedure Judge Ellis imposed based on ICARA and the

Treaty, including the inability to take the deposition and testimony of officials of the State Department on its Travel Warnings for Colombia, April 17, 200; Public Announcement of the security situation in Colombia, February 22, 2002; and, its designation of Foreign Terrorist Organization, March 27, 2002, judicial notice was required of the news media reports on the rapidly deteriorating situation in Colombia.

Precedent in other Circuits have held specifically because of the rapidly deteriorating situation in Colombia the use of judicial notice is appropriate. The Second Circuit in *Irragorri v. United Technologies Corp. and Otis Elevator Co.*, 274 F.3d 65, 75 (2nd Cir. 2001) (*en banc*), and the Sixth Circuit in *Bridgestone Firestone, Inc. Tires Products Liability Litigation*, Order Denying Defendant Ford and Firestone's Motions to Dismiss Colombian and Venezuelan Cases on Ground of *Forum Non Convenience* at 31-33, J.P.M.L. No. 1373 (S.D. Ind. Mar. 25, 2002), took judicial notice of the State Department's announcements, news articles and Internet web sites concerning the recent increased dangers in Columbia. As they noted this is because recent numerous terrorist events in Colombia are only reported in the news media, *see* of *Silverman v Silverman*, 2002 WL 971808 (D. Minn. May 9, 2002).

Thus given that all of Colombia is in the midst of war. such that neither the Army or Police, much less the Court can protect their own citizens, the lower courts' refusals to take judicial notice are a violation of the constitutional rights of Rodriguez and Isidoro to be secure in the United States.

E. The Lower Courts Unconstitutionally Failed to Respect the Objections of Rodriguez and Isidoro's Determination to Stay in the United States Based on Judge Ellis' Subjective Opnion.

Judge Ellis expressed a clear subjective preference for Hazbun's use of the Treaty and ICARA to control the proceedings irrespective of the danger in Colombia, and that he was not going to

listen to either the objections of Isidoro or his Father on the issue of the fundamental right to teach Isidoro the rights and duties of being a U.S. citizen, or to protect Isidoro, or Isidoro's fundamental right to stay and enjoy the benefits and opportunities of being in the United States with his father.

This Court stated in *Troxel*, 530 U.S. at 67, that when a fit parent's decision of the kind at issue here "becomes subject of judicial review, the court must accord at least some special weight to the parent's own determination." Also Isidoro's opinion must be taken into account under both Virginia law, given Judge Ellis was effectively deporting him to Colombia until he is 18 years old, and thereby depriving him of his liberty and rights as a U.S. citizen based on Hazbun's manipulation of the judicial process in Colombia and in the United States. Justice Stevens stated in *Troxel*, *Id.* at 74,

> [w]hile this Court has not yet had occasion to elucidate the nature of a child's liberty interest in preserving established familial or family-like bonds [*Michael H. v. Gerald*, 491 U.S. 110 at 130 (1989)](reserving the question), it seems to me extremely likely that to the extent parents and families have fundamental liberty interest in preserving such intimate relationships, so too, do children have these interest, and so, too, must their interests be balanced in the question. . . . **The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by the interest in the welfare of the child**. (Emphasis added)

In *Marbury v. Madison*, 5 U.S. 137 (1803), this Court recognized that inherent in every judicial decision was a deceleration and interpretation of the relevant general principles of law. "It is emphatically the providence and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

Fundamental to this decision making process was that the enunciated law be subsequently applied to subsequently similarly situated litigants. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

Indeed, this principle of reliance upon enunciated precedent is at the backbone of our legal system. As stated by Justice Joseph Story, *Commentaries on the Constitution of the United States* §377-78 (1983),

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedent and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. **It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.** (Emphasis added)

Thus the subjective views of Judge Ellis clearly violated the above cited relevant precedent as to Rodriguez and Isidoro's fundamental Constitutional rights, because as noted even judges cannot violate the protections in the Constitution based on their subjective views, *Reid v. Covert*, 77 S.Ct at 1230.

F. The Lower Courts use of *Comity* Violated Fundamental Rights of Rodriguez and Isidoro

The Supreme Court established an American federal common law doctrine grounded on the principles of international

comity. The Court held that comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In *Miller v. Miller*, 240 F.3d 392 at 397(4th Cir. 2001), it was stated that "comity is at the heart of the Treaty." However to be granted comity, or respect, a judicial or administrative decision must be rendered after a **fair trial by a court having jurisdiction of the parties and issues**. *Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1927).

In Colombia, the State Department's Country Report at page 21, recognizes that generally, "the suborning or intimidation of judges . . . is common." Also in this action there has been a pattern and practice of the Colombian courts and administrative agencies to violate Rodriguez's rights to a fair hearing because he is U.S. citizen: refusing to consider the verbal divided custody agreement, issuing *ex parte* orders changed the joint custody to sole custody, and refusing to hear Isidoro on his preference to be with his father. Thus as applied the Treaty and ICARA are unconstitutional.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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